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IN THE

Supreme Court of the United States

October Term, 1944.

No. 691.

RAILWAY MAIL ASSOCIATION,
Appellant,

against

EDWARD S. CORSI, as Industrial Commissioner of the State of New York, and NATHANIEL L. GOLDSTEIN, as Attorney-General of the State of New York,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEES.

NATHANIEL L. GOLDSTEIN,
Attorney-General of the State of New York,
Counsel for Appellees.

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Appeal from the Supreme Court of the State of New York.

BRIEF FOR APPELLEES.

History of the Case.

The opinions below are reported, under substantially the same title, at 180 Misc. 868, 44 N. Y. S. 2d 601 (Murray, J., Spec. Term N. Y. Sup. Ct., Albany Co., Nov. 4, 1943, R. 18-27), reversed, 267 App. Div. 470, 47 N. Y. S. 2d 404 (App. Div. 3rd Dept., Mar. 8, 1944, R. 29-32), the latter affirmed, 293 N. Y. 315 (Ct. Ap., July 19, 1944, op. by Lehman, Ch. J., R. 32-39).

Jurisdiction.

Appeal to this Court was taken pursuant to 28 U. S. C. § 344 (a). On December 18, 1944 an order was entered postponing further consideration of the question of jurisdiction until argument on the merits.

Responding to the third point of the appellant's present brief, no issue is joined. The doubt as to the jurisdiction of this Court to review the final action of a State court in a suit for declaratory judgment, inferred from the majority opinion in *Willing* v. *Chicago Auditorium*, 277 U. S. 274 (1928), was removed by the unanimous decision in *Nashville etc. Ry.* v. *Wallace*, 288 U. S. 249 (1932). The appellee State officials have never questioned that this suit by the Association against them presents a real and substantial controversy, however unbalanced in merits.

Questions.

The questions which have survived to this Court appear to be:

1. Is there constitutional objection, under the due process and equal protection clauses of the Fourteenth Amendment, against the statute of the State of New York (Civil Rights Law § 43, enacted by L. 1940 c. 9) which forbids all labor organizations, including the appellant Association, from denying membership in such organization by reason of race, color or creed?

2. Is there constitutional objection, under the provisions of the Constitution of the United States relative to post offices and interstate commerce, to the enforcement of such statute against the appellant Association, made up of white male members of the Railway Postal Service?

The Statute Involved.

Civil Rights Law § 43 was enacted by chapter 9 of the Laws of 1940, and is as follows:

> "§ 43. Discrimination by labor organizations prohibited. As used in this section, the term 'labor organization' means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection. No labor organization shall hereafter, directly or indirectly, by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, deny a person or persons membership in its organization by reason of his race, color or creed, or by regulations, practice or otherwise, deny to any of its members, by reason of race, color or creed, equal treatment with all other members in any designation of members to any employer for employment, promotion or dismissal by such employer."

Section 41, which was amended by the same chapter and has been further amended in 1941 and 1942, provides for the penalties. Section 45, added in 1942, vests certain powers of administration in the Industrial Commissioner.

Labor Law §§ 701 and 715, printed in the Association's brief, pages 4-5, have no present relevance. The Appellate Division and the Court of Appeals decided adversely to the Association (R. 31, 36-38) the contention, on which it was successful at Special Term (R. 21), that the Labor Law provisions are to be read *in pari materia* with the Civil Rights Law definition of "labor organization" and hence either provide an exception from the anti-discrimination statute directly applicable to the Association, or exceptions available to others which make the Association's inclusion unreasonable and discriminatory.

Facts.

The basic facts in the case are undisputed, and are set forth in the complaint (R. 1-10) and a stipulation (R. 11-14).

The complaint sets forth the facts concerning the organization of the Association, its racial restrictions, the unwillingness of its New York branch to be bound by the racial restrictions in view of their violation of the Civil Rights Law, and the threats of the Industrial Commissioner under advice of the Attorney-General to enforce the Civil Rights Law against the Association. Judgment is prayed declaring that the Association is not a "labor organization", that the application of the statute to it is unconstitutional if it is such an organization, and for an injunction restraining the enforcement of the statute.

The answer (R. 10-11) admits all the allegations of the complaint except certain conclusions of law respecting the definition of a "labor organization" and hence the status of the Association, and also except the unconstitutionality of the statute.

The stipulation deals with the mechanics of submitting the issues to the courts and lists certain documentary materials to be considered. The principal significance of this literature is to describe the activities of the Association. It is no longer needed for the purpose of proving that the Association is a "labor organization" within the meaning of the statute, that issue having been finally determined against the Association by the State courts, but may have some present relevance for showing that the Association's activities are of such nature that the State may reasonably extend its regulation over them, and that this can be accomplished without any unconstitutional interference with Federal jurisdiction.

The Association is a New Hampshire corporation, with branch organizations which operate in New York State.

For many years its Constitution has contained in Article III the following restriction upon membership:

> "Any regular male Railway Postal Clerk or male substitute Railway Postal Clerk of the United States Railway Mail Service, who is of the Caucasian race, or a native American Indian, shall be eligible to membership in the Railway Mail Association."

Likewise, its application blank has as part of its first question, immediately after blanks for the applicant's name and age: "My race or color is * * *".

Appointments to the Railway Mail Service and promotions in it are made pursuant to certain laws of the United States regulating the civil service. That there are, and have been for many years, a substantial number of Negro railway mail clerks, may be inferred from the complaint, and sufficiently appears from the literature mentioned in the stipulation (R. 12-13), particularly "*Handbook of American Trade Unions*", 1936 edition, being Bulletin No. 618 of the U. S. Dept. of Labor, pp. 37-38, 44, 310-311; and "*The Labor Movement in a Government Industry*", by Sterling D. Spero, a book published in 1924 and republished in 1927. See also "*Organized Labor and the Negro*", by Herbert R. Northrup, published by Harper & Bros., 1944, at pp. 2, 240-241.

The same texts attest that the Association's discrimination policy is deliberate, long-continued and well known.

Representation of railway postal employees in dealing with their governmental employer concerning grievances or terms or conditions of employment, is only one of several activities of the Association. In that field it has

not attained the position of being a sole bargaining representative or negotiated a closed shop agreement. In paragraph 22 of its complaint it disavows the right to strike as a method of redressing grievances. Its status in the labor field appears to be somewhere between the claims which the stipulated literature shows it as making to its membership, of having brought about nearly every advance in their pay and working conditions obtained in the past forty years, and the excessively modest representations made in its briefs in this litigation. Appellees will argue the constitutional issues upon the premise, fully established by the record, that the Association is a bona fide labor organization, which has achieved some appreciable changes in the Postal System for the benefit of its members. That non-members have shared in the benefit is asserted in the appellant's brief, page 30, and probably is true, although not necessarily in the equal measure asserted. The Court of Appeals summarizes the Association's activities as follows:

> "The purpose for which the plaintiff is constituted, as formulated in its charter, is 'to conduct the business of a fraternal beneficiary association for the sole benefit of its members and beneficiaries and not for profit; to promote closer social relationship among Railway Postal Clerks; *to better enable them to perfect any movement that may be for their benefit as a class* or for the benefit of the Railway Mail Service; to provide relief for its members and their beneficiaries and make provisions for the payment of benefits to them, in case of death, sickness, temporary or permanent physical disability, either as a result of disease, accident or old age.' (Italics through this opinion are supplied.)
> "The purpose of 'collective bargaining' is not included in the objects for which the plaintiff exists and is constituted. Membership in the plaintiff is confined to mail clerks who are civil service employees and the plaintiff and the defendants agree that the terms and conditions of employment of civil service employees

of the Post Office and of other departments or agencies of the Federal, State or City government must be fixed by governmental authority and not by collective bargaining.* The purpose of 'mutual aid or protection' and in proper case of discussing grievances with their employer and presenting demands or suggestions of their members *as a class*, is included by plain implication in the purposes set forth in the charter. Indeed, among the duties of the Industrial Secretary of the organization, prescribed in its constitution, is the duty to 'assist in the presentation of grievances pertaining to service conditions and endeavor to secure adjustment of such through administrative action.' The plaintiff joined the American Federation of Labor, which purports to be a federation of labor unions. It is denominated a labor union in the Bulletin of the Department of Labor of the United States. It is described as a trade union or labor organization in publications and reports concerning phases of the labor movement by students and organizations of recognized authority, including a recent publication of the Twentieth Century Fund. In its own publications the plaintiff Association claims the credit for bringing 'to every railway postal clerk many material benefits' and for 'many additional millions of dollars brought to the pockets of railway postal clerks each year by the efforts of the Association,' and it points out that 'reforms always come as the result of demands from the worker. If better conditions are worth securing, they must come as the result of organized effort.' An association constituted for the purpose of 'organized effort' and the presentation of concerted demands of workers as a class in order to secure material benefit and reforms in conditions of employment is a 'labor organization' both in common parlance and as defined in section 43 of the Civil Rights Law.

"That is true though the association may exist and be constituted 'in part' for other purposes. In this case the plaintiff Association conducts, pursuant to its charter, 'the business of a fraternal beneficiary association for the sole benefit of its members and beneficiaries and not for profit' and it furnishes insurance at cost

* See appendix to this brief.

to its members. Pursuant to its charter and ritual the plaintiff also seeks 'to promote closer social relations among Railway Postal Clerks' or rather among white Railway Postal Clerks eligible for membership in its Association. If these were its only objects it would not be a labor organization and would be free to admit or exclude from membership such persons as it chose, for good reason, for bad reason or for no reason, but it is undisputed that its objects are not so limited. Indeed, in its own publication it has said: 'The activity of the Association is directed along two distinct lines, promoting the welfare of railway postal clerks *by improving conditions under which they work,* and providing benefits for disability and death due to accidental means.' To carry out the second activity within the State of New York, the plaintiff Association applied for and received permission to do so from the Superintendent of Insurance, though he ruled that no license was necessary. The fact that the Association is lawfully providing insurance within the State for its members does not tend to show that its members are not associated in an organization which exists and is constituted 'in part' for objects which mark it as a 'labor organization' as defined in the Civil Rights Law." (R. 35-36, also 293 N. Y. at pp. 319-321).

The duties of the Association's Secretary, as set forth in its Constitution (Art. VII, §3) includes the duty:

> "To act as representative of members of the Railway Mail Association before the United States Employees' Compensation Commission."

Another exhibit in this case, the pamphlet printed by the Association about 1930 (R. 12), at page 9 makes an argument for membership based largely upon the benefits obtained by the Association for all railway postal clerks but includes the following arguments based upon a narrower economic interest:

> "Seniority rules—establishing certain fundamental principles governing promotions; preference for runs and assignments in an organization. The Railway Mail

Association is the only postal group having a seniority system recognized by the Department.

"The right of the individual to appeal to the head of the Department through your officers or regular department channels, any grievance.

* * * * *

"The Railway Mail Association furnishes the highest grade of accident insurance to its members, at cost."

POINT I.

The statute, in its application to the Association, does not violate the due process or equal protection clauses of the Fourteenth Amendment.

The argument under this point is intended to answer Point I of the appellant's brief. The argument of that Point seems to be fairly well represented by the following quotations from appellant's pages 30 and 32-33:

"To apply these Civil Rights sections to the appellant or to its division and branch associations or members would constitute an arbitrary and unreasonable regulation. It would be unreasonable to deprive the appellant or its members of the right to make selection in choosing members. Such choice does not constitute a discrimination which is unfair or unjust because it works no economic injury to any Railway Postal Clerk who is not a member of the appellant Association. The appellant has nothing to do in influencing the appointment or promotion in positions in the postal system where the rights appertaining thereto are fixed by the Civil Service Laws of the Federal Government. Any effort exerted by the appellant to advance the interests and welfare of the Railway Postal Clerks, if successful, redounds to the benefit of every Railway Postal Clerk in the same category whether he is a member of the appellant's Association or not. Consequently, the rights of no Railway Postal Clerk are adversely affected or limited and it is an unreasonable intervention

of the State under the circumstances of this cause to apply the State law to the appellant or its officers and members, and is offensive to the due process clause of the Fourteenth Amendment. It amounts to a deprivation of the property rights of the appellant and places an unreasonable limitation upon the ownership and management of its property and its right to the liberty of contract."

* * * * *

"The question of discrimination when applied to the case at bar is a sociological matter which, in the absence of a constitutional grant from the people to the government, cannot be regulated under the State Police Powers. Such discrimination is not unjust. It is a preference causing no injustice to anyone.

"It concerns a social relationship which must rest on voluntary action. The law cannot coerce its performance. We are all left free to choose. This is a personal and constitutional right beyond the power of legislation. The choice is inherent in the person. Tolerance may broaden the choice and benevolence may soften to the point of common acceptance. Education and the spirit of Christianity may efface the thought of social differences. Coercive legislation is not the remedy."

Appellant's argument under the Fourteenth Amendment, as now made, may be summarized as *lack of a public interest* in the Association's activities, or lack of a public interest of a kind and intensity which justifies legislation.

This argument was only briefly touched upon in the State courts, the appellant's argument under the Fourteenth Amendment until now having been confined almost entirely to an attack upon the statute as discriminatory, which argument depended upon a statutory interpretation the State courts have rejected (R. 37-38), and accordingly that constitutional argument is unavailable to the appellant in this Court.

It is not difficult to answer the argument under the Fourteenth Amendment now made on behalf of the Association. It will be discussed first in its broader form, as related to the general subject-matter of the statute, and then in its narrower form, as related to the Association's special circumstances.

The courts did not learn for the first time in 1944 about the possibilities for abuse which exist in unionism. *Shinsky* v. *O'Neil*, 232 Mass. 99, 121 N. E. 790 (1919); *Williams* v. *Quill*, 277 N. Y. 1, 12 N. E. 2d 547 (1938), ap. dis., 303 U. S. 621 mem.; *Matter of Miller* v. *Ruehl*, 166 Misc. 479, 2 N. Y. S. 2d. 394 (1938); *Carroll* v. *Local No. 269*, 133 N. J. Eq. 144, 31 Atl. 2d. 223 (1943). And racial discrimination in employment was known to be an evil in earlier years. *New Negro Alliance* v. *Grocery Co.*, 303 U. S. 552, 561 (1938). In the two New York cases cited, both in 1938, Chief Judge Crane and Justice Harris separately observed that legislation might provide the remedy for abuses by labor organizations. Three recent decisions by this Court are to similar effect, although announcing the principle that a union having power of exclusive representation exercises a trust subject to judicial correction, at least in certain matters. *Wallace Corp.* v. *N. L. R. B.*, 65 S. Ct. 238, 241-242, 247; *Steele* v. *Louisville & N. R. Co.*, 65 S. Ct. 226; *Tunstall* v. *Brotherhood*, 65 S. Ct. 235. Compare, *James* v. *Marinship Corp.*, 13 L. W. 2345, 154 P. 2d.—(Calif. Sup. Ct., Dec. 1944).

From the standpoint of public interest, and hence of constitutionality of the present statute as appellant now seeks to present that issue, the case for the legislation is well stated by Professor Sumner H. Slichter, in a foreword to *"Organized Labor and the Negro"* (by Herbert R. Northrup, published by Harper & Bros. 1944). Professor Slichter says that the book raises certain fundamental

questions about unions, illustrated by the history of the attitude of unions toward economic opportunity for Negroes, and that one of the questions is whether unions are private clubs or quasi-public institutions.

> "They started out as private clubs or fraternal societies. Many of them still retain the traditions and point of view of such organizations. The growth of unions in numbers and power, however, is causing them to be clothed with a public interest. More and more they are in a position to determine who is permitted to make a living in a particular trade, industry or locality. Consequently, their admission requirements are becoming a matter of public interest as the laws of New York, Kansas and Nebraska make plain."

The laws thus referred to are mentioned more specifically at page 239 and following of the text. Besides the New York statute involved herein, there are similar laws of Kansas (Acts of 1941 c. 265) and of Nebraska (Acts of 1941 c. 96).* At page 2 the text lists the Association among eight unions which are the larger and more influential organizations in the American labor movement and whose exclusionist policies have substantial effects on job opportunities for colored workers.

The fact that anti-discrimination legislation was pending in Congress in 1944, adverted to in the appellant's brief for the purpose of quoting certain arguments made by opponents of the legislation,** like the legislative history of the statute now involved and the reports and messages concerning it, also mentioned in the appellant's

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* Pennsylvania denies the benefits of its Labor Relations Act to labor organizations which discriminate as to membership (L. 1937, c. 294), and Illinois and New Jersey forbid racial discrimination in certain classes of employment.

** Appellant's brief, p. 33; also pp. 44-46.

brief,* essentially are an answer to the Association's present argument that the discriminatory activities of the Association and other labor organizations are not properly a matter of public concern. Instead of aiding the Association's present argument, they demonstrate the existence of a problem well within the field of legislative discretion, and at least greatly narrow the argument.

The narrow form of the appellant's argument depends upon adopting a narrow view of the Association's activities and their effectiveness in achieving better employment conditions. Indeed, to support the argument it is necessary to prove that the Association's effectiveness in that field is zero, not only for the present but in potentiality. The mere facts that the Association has not yet attained a power over the individual employee comparable with that wielded by some other labor organizations, and that the nature of civil service employment offers a restraint to the attainment of such power, are not sufficient.

Racial discrimination can and sometimes does exist in the public service, as is made clear by the activities of the FEPC and by the presidential order creating and empowering it.** And the Association is not so ~~important~~ impotent that

* Pages 34-36. The stipulation also includes reference to Governor Lehman's annual message of 1940 (R. 14). Official references to racial discrimination affecting employment in the State of New York may also be found in Governor Dewey's annual messages of 1943, 1944 and 1945, and a special message of 1944 recommending enactment of L. 1944 c. 692. See also, the recent Report of the New York State Temporary Commission against Discrimination, 1945 Legis. Doc. No. 6. Relative to the quotations in appellant's brief, page 35, from Governor Lehman's memoranda of 1939 and 1940, it should be noted that what was disapproved in the 1939 bill was its method of enforcement, by exclusion of offending labor organizations from provisions of the State Labor Relations Act. New York's anti-discrimination laws are intended to effectuate a general prohibition inserted in its Constitution in 1938, found in Article I § 11.

** See page 18 of this brief.

its discriminatory practices must necessarily and for all time fail to be, not merely a bad example in a place where a better one might be expected, but a positive influence for the evil. It is upon that ground that the Court of Appeals quoted the Association's own words in a manner which answers the narrow form of its present argument:

> "In its official magazine, 'Railway Post Office,' the plaintiff published an article by its Industrial Secretary in which it said: 'Only through collective action have workers ever improved wage and working standards, but it is particularly true today that the worker whether in industries or *the government service* who is not a member of his group organization is merely an unheard voice crying in the wilderness.' Whether or not these statements are wholly accurate is immaterial. At least they are not without foundation and the Legislature does not act arbitrarily or capriciously when it determines that no association of workers, whether in industry or in the civil service, which undertakes to speak and act collectively for such workers in improving wages and working standards may deny membership to a worker because of race, creed or color relegating him to the wilderness where he must cry unheard." (R. 39.)

At page 30 of its brief the Association argues that its every effort on behalf of railway postal clerks redounds to the benefit of all, non-members as well as members. That, we submit, is not entirely accurate for, as pointed out in the Statement of Facts, *supra*, the Association does act as the representative of its members in matters before the United States Employees' Compensation Commission, the individual members of the Association do have the right to appeal, through the officers of the Association, to the head of the Department concerning any of their grievances, and they are entitled to obtain from the Association the highest grade of accident insurance at cost.

The inference seems warranted that the Association's membership, and its membership policy now involved, sometimes influence its efforts on behalf of certain types of administrative or legislative action. For that matter, it would be difficult to convince the Negro clerks whose applications for membership gave rise to the present litigation, that the Association's efforts herein are impartially devoted to their interests.

It is submitted, upon the foregoing, that there was a legitimate public concern with the subject matter of Civil Rights Law § 43 which justified the prohibition it extended in 1940 over racial discriminations by labor organizations generally, and justified the inclusion of the Association within the scope of prohibition, although the Association is composed of a particular class of government employees and is not their exclusive representative. It is respectfully submitted that no valid ground of objection under the Fourteenth Amendment has been stated by the Association against the statute.

POINT II.

The statute, in its application to the Association, is not invalid as an interference with the Postal System or Interstate Commerce.

Like a tramp who asserts his immunity from constables because he is riding the rods of interstate freight, the Association claims a relationship with the Federal Government so intimate that its discriminatory acts are beyond State redress.

It will be noted that there is some inconsistency between the importance which the Association attaches to its function of employee representation for purposes of this argu-

ment, and its modesty concerning that function for purposes of arguing the preceding point. As previously stated, appellees will argue the constitutional issues upon the premise, fully established by the record, that the Association is a *bona fide* labor organization, which has achieved some appreciable changes in the Postal System for the benefit of its members.

Nevertheless, the Association's relationship to the Postal System falls considerably short of express recognition as an essential instrumentality of the Federal Government.*

The Lloyd-LaFollette Act of Aug. 24, 1912 (37 Stat. 555; 5 U. S. C. § 652), in the light of the events leading up to it (as to these, see *Spero's* text previously cited, pp. 96-185), assures all postal employees, and particularly railway mail clerks, that they have the right to belong to a labor organization, even to one affiliated with the American Federation of Labor, subject to the restriction that the affiliation must not impose an obligation to strike or be designed to aid a strike of postal employees. The relevant language of the Act is as follows:

> "Membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups

* At page 39 of appellant's brief it says, "We do not contend that the appellant is a governmental agency or instrumentality," but at page 37 it says that the Association's members, as railway postal clerks, are "instrumentalities of the postal system," and at pages 40-41 and 43-44 it makes an argument which is summarized at page 41 in the statement that the prohibition of State action rests on the entire absence of power on the part of the State to touch the instrumentalities of the United States.

> of persons in said Postal Service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service. The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with."

A similar tolerance has been extended more generally in recent years to organizations of Federal employees. President Roosevelt's letter of August 16, 1937, to Luther C. Steward, President of the National Federation of Federal Employees (cited by Mr. Justice Murray at R. 26), which has been widely quoted as the present executive view upon this matter, says:

> "Organizations of Government employees have a logical place in Government affairs. The desire of Government employees for fair and adequate pay, reasonable hours of work, safe and suitable working conditions, development of opportunities for advancement, facilities for fair and impartial consideration and review of grievances, and other objectives of a proper employee relations policy, is basically no different from that of employees in private industry. Organization on their part to present their views on such matters is both natural and logical * * *."

See the *"Handbook of American Trade-Unions,"* previously cited, at pages 298-307 of the 1936 edition, for lists of such organizations composed of Federal employees. See also, *"Employee Relations in the Public Service"* (Chicago, 1942), and Carol Aggar, *"The Government and its Employees,"* 47 Yale L. J. 1112.

That the policy of the statute is entirely consistent with the policy of the Federal Government in the same field is

shown by the Executive Order establishing the FEPC and defining its powers, particularly the provision:

> "I do hereby declare that it is the duty of all employers, *including the several Federal departments and agencies, and all labor organizations*, in furtherance of this policy and of this Order, to eliminate discrimination in regard to hire, tenure, terms or conditions of employment, or *union membership* because of race, creed, color or national origin." (E. O. 9346 of May 27, 1943; Code Fed. Reg., Cum. Sup., Book 1 page 1280; italics added.)

Compare, *Allen-Bradley Local* v. *Board*, 315 U. S. 740, 748-749.

Appellant's brief, in arguing that the statute is an unconstitutional interference with the postal service and interstate commerce, relies upon a broad array of cases, of which *Johnson* v. *Maryland*, 254 U. S. 51, seems to be most nearly relevant for present purposes, and none of them involves railway mail clerks. Two cases which do involve such clerks and which support the State's view are: *Price* v. *Pennsylvania R. Co.*, 113 U. S. 218, and *Martin* v. *Pittsburgh & L. E. R. Co.*, 203 U. S. 284.

The *Price* case and the *Martin* case each involved a statute of Pennsylvania which limited the liability of a railroad, in cases of suits by persons employed to work in or about the railroad, to the recovery they could have if they were employees of the railroad. In each case this statute had the effect of defeating the recovery.

The *Price* suit was brought by the widow of a "route agent" or railway mail clerk, employed by the United States, who had been killed in a railway collision while in discharge of his duties. In the *Martin* case the suit was by a railway postal clerk who had been injured in a wreck while engaged in his duties, and sued the railroad for his

injuries. The following excerpts from the opinion of Mr. Justice White in the *Martin* case indicate the decisions in both cases:

"Under the settled construction given to the statute by the Supreme Court of Pennsylvania the plaintiff, as a railway postal clerk, was not a passenger and had no greater rights in the event of being injured in the course of his employment than would have had an employe of the railroad company.

"Was the application of the statute thus construed to a railway postal clerk of the United States, in conflict with the power of Congress to establish post offices and post roads?

"In *Price* v. *Pennsylvania Railroad Co.*, 113 U. S. 218, this question was in effect foreclosed against the plaintiff in error. That case was brought to this court from a judgment of the Supreme Court of Pennsylvania, 96 Pa. St. 258, holding that a railway postal clerk was not a passenger within the meaning of the Pennsylvania act, and hence had no right to recover for injuries suffered by him in consequence of the negligence of an employe of the company. The Federal ground there relied upon was substantially the one here asserted; that is, the power of the Government of the United States to establish post offices and post roads, and the effect of the legislation of Congress and the act of the Postmaster General in appointing mail clerks thereunder. After fully considering the subject the case was dismissed because no substantial Federal ground was involved, the court saying (113 U. S. 221):

"'The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge, nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the Government to carry him, affect the question. It would be just the same if the company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United

States which authorize this employment and direct this service do not therefore make the person so engaged a passenger, or deprive him of that character, in construing the Pennsylvania statute. Nor does it give to persons so employed any right, as against the railroad company, which would not belong to any other person in a similar employment, by others than the United States.'

"This brings us to the second contention, the repugnancy of the Pennsylvania statute to the commerce clause of the Constitution. It is apparent from the decision in the *Price case*, just previously referred to, that in deciding that question we must determine the application of the statute to the plaintiff in error, wholly irrespective of the fact that at the time he was injured he was a railway postal clerk. In other words, the validity or invalidity of the statute is to be adjudged precisely as if the plaintiff was at the time of the injury serving for hire in the employ of a private individual or corporation.

"Under the circumstances we have stated, the case of *Pennsylvania Railroad Co.* v. *Hughes*, 191 U. S. 477, clearly establishes the unsoundness of the contention that the Pennsylvania statute in question was void because in conflict with the commerce clause. * * *

"The proposition that the statute denied to the plaintiff in error the equal protection of the laws because it 'capriciously, arbitrarily, and unnaturally,' by the classification made, deprived railway mail clerks of the rights of passengers which they might have enjoyed if the statute had not been enacted, is without merit. The classification made by the statute does not alone embrace railway mail clerks, but places in a class by themselves such clerks and others whose employment in and about a railroad subject them to greater peril than passengers in the strictest sense. This general difference renders it impossible in reason to say, within the meaning of the Fourteenth Amendment, that the legislature of Pennsylvania, in classifying passengers in the strict sense in one class, and those who are subject to greater risks, including railway mail clerks, in another, acted so arbitrarily as to violate the equal protection clause of the Fourteenth Amendment." (203 U. S. pp. 292-293, 296.)

It seems obvious that a law determining the risks that railway mail clerks assume, as a condition of their employment, and the extent to which injuries to them are recoverable from the railroads, has a much more direct effect upon the Postal Service than a law forbidding discrimination in union membership. Particularly is this so, if we consider the Association's activities as predominantly insurance and social relationships, as urged in some parts of its brief.

In *Houston* v. *Moore*, 5 Wheat. 1, this Court held constitutional a statute of Pennsylvania inflicting penalties upon members of its militia who refused to perform Federal service. At page 34 Mr. Justice Johnson, arguing that a State may make a violation of a Federal act an offense under State law also, said:

> "Witness also the crime of robbing the mail on the highway, which is unquestionably cognizable as highway robbery under the state laws, although made punishable under those of the United States."

In *United States* v. *Hart*, Pet. C. C., decided by Mr. Justice Washington at Circuit at about the same time as the case last cited (1817 and 1820, respectively) and cited with approval by Mr. Justice Holmes in deciding *Johnson* v. *Maryland*, 254 U. S. 51, 56, it was held that a mail carrier could be convicted and fined under a Philadelphia ordinance for driving his carriage recklessly through a crowded street. To similar effect is the opinion of the Attorney General of the United States in 1852 (5 *Op. Atty. Gen.* 554), likewise cited with approval, advising the Postmaster General that carriers of mail on railroads were not exempt from an ordinance of Jersey City prohibiting trains to move through the city at a speed greater than six miles per hour. See, to similar effect, dicta in *Illinois Central R. Co.* v. *Illinois*, 163 U. S. 142, 154, and *Mississippi R. R. Com.* v.

Illinois Central R. Co., 203 U. S. 335, 345. In *United States* v. *Kirby*, 7 Wall. 482, it was held that a carrier of mails might be arrested and detained upon a State indictment for murder, Mr. Justice Field saying at page 487:

> "Common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

Returning now to the case of *Johnson* v. *Maryland*, 254 U. S. 51, relied upon by the Association, it is to be noted that the mail carrier whom the State of Maryland attempted to punish for failure to obtain an operator's license by submitting to an examination and paying a fee of three dollars, was an employee of the Government and was driving its motor truck with mail from a point in Maryland to Washington, D. C., when he was arrested. No room was left for doubt that there had been a direct and substantial interference with the Postal Service. The opinion of Mr. Justice Holmes cited *United States* v. *Hart, supra*, and *Commonwealth* v. *Closson*, 229 Mass. 329, 118 N. E. 653, L. R. A. 1918 C 939, saying:

> "Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. * * * It very well may be that, when the United States has not spoken, the subjection to local law would extend to *general rules that might affect incidentally the mode of carrying out the employment*—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets." (254 U. S. at p. 56; emphasis added.)

But as to the case before it, the opinion said:

> "It seems to us that the immunity of the instruments of the United States from state control in the per-

formance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. *Such a requirement does not merely touch the Government servants remotely by a general rule of conduct,* it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed." (254 U. S. at p. 57; emphasis added.)

The distinctions suggested by the emphasized language in those quotations are well illustrated by *State of Washington* v. *Wiles,* 116 Wash. 387, 199 Pac. 749, 18 A. L. R. 1163. That case, incidentally, is much more like *Johnson* v. *Maryland* than is the present case. Wiles had contracted with the United States to carry mail in Seattle in motor trucks which he furnished, together with their operators. He refused to obtain truck licenses, an information was filed against him and he was arrested, apparently at a time and place which did not interfere directly with the carrying of the mails. The Washington Supreme Court said, in the final paragraphs of its opinion:

"While it is true, generally speaking, that a state may not by its laws hamper and interfere with the free and orderly performance of governmental functions, by taxation or otherwise, yet that interference must be substantial and direct. Every indirect and immaterial interference with the conduct of government business is not violative of the principles upon which the federal government is founded and performs its duties. The rule of reason must control in all such questions; otherwise the states will be greatly hampered in the conduct of their affairs, without any corresponding benefit flowing to the national government.

"We are confident that the appellant is not, because of the facts of this case, relieved from complying with the state statute imposing upon him the motor truck license fee."

Upon like reason, applicable with stronger reason upon the facts of the present case, it is respectfully submitted that Civil Rights Law § 43 is not unconstitutional because of its application to the Association.

Finally.

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

Albany, February 15, 1945.

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APPENDIX.

In quoting from the Court of Appeals opinion summarizing the Association's activities, the following sentence was starred for comment:

> "The plaintiff and the defendants agree that the terms and conditions of employment of civil service employees of the Post Office and of other departments or agencies of the Federal, State or City government must be fixed by governmental authority and not by collective bargaining."

Undoubtedly the statement is true as a generality, but it might be so understood that it would be misdescriptive of the Association's activities. We repeat, from pages 23-25 of our brief before the Court of Appeals, the following paragraphs:

The employers of the railway mail clerks are the officials of the Postoffice Department, or Congress and the other branches of the government itself. The purpose is to obtain from them improvement of pay and working conditions. The methods are described by Mr. Spero in Chapter XVI of his text, pp. 270-274; and see also 280-286, 296-297, 303-304. At page 270 he says:

> "Postal organizations have sought the attainment of their objects by direct dealing with the administrative chiefs and by bringing pressure to bear on Congress. Where the former method was unsuccessful or inadequate to the remedy sought, they have turned to the latter. The principal methods by which they have sought to influence legislation have been first, by lobbying and by presenting their cases to the Congressional committee of proper jurisdiction; second, by agitation and publicity through advertising conditions in the local press and through the organization of mass meetings; third, and seldom, by using their organized political power at the polls; and fourth, a method becoming less and less frequent, by playing politics 'back home.'

"Publicity and direct dealing with Congress have been the methods which have proved most successful. Though the associations had long tried to work with and through the Department and to influence the legislature in their behalf through a sympathetic executive, the method has not been satisfactory. The development of the postal labor movement has shown a definite trend away from such indirection."

At pages 258-259 Mr. Spero describes in some detail the method of "direct dealing with the administrative chiefs." Although his text refers specifically to negotiations and an agreement entered into in 1921, and departed from later in the same year, it appears elsewhere (see, for instance, an editorial in the "Railway Post Office," for Oct. 1940, vol. 42 p. 33) that such conferences and agreements have become a regular and more dependable feature of the collective bargaining or dealing between the Association and the higher officials of the postal service. The method described is as follows:

"At its [the Association's] suggestion, its national executive committee, the division superintendents, the General Superintendent of the railway mail service and the Second Assistant Postmaster General met together in a series of conferences and discussed a number of important administrative matters affecting the interests of the clerks and the service. Papers presented by the Association's representatives, dealing with hours of service, seniority, promotions, service rating system, the construction of railway mail cars, etc., formed the basis of the discussions. A joint subcommittee of the conference, consisting of three supervisory officials and three officers of the Association, drew up formal agreements affecting hours of service, seniority, promotions and terminal and transfer service. These agreements were approved by the General Superintendent and the president of the Railway Mail Association and submitted to the Second Assistant in the form of recommendations. That officer had

previously assured the joint conference that 'such agreements as may be reached will be carried out faithfully by the Department.' ''

The Constitution of the Association prescribes the following specific duties for the Industrial Secretary, besides collecting and compiling "data relative to wage standards and working conditions," "which may be of benefit in promoting the welfare of Railway Postal Clerks":

> "To assist in the presentation of grievances pertaining to service conditions and endeavor to secure adjustment of such through administrative action."
>
> "To act as the representative of members of the Railway Mail Association before the United States Employees' Compensation Commission." (p. 11 of item "a" in stipulation,—fol. 57.)

Those duties seem to be quite clearly, "dealing with employers, concerning grievances, terms or conditions of employment." The columns of "The Railway Post Office" (the official magazine of the Association) are constantly filled with reports of those and similar activities.